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Before the

FEDERAL COMMUNICATIONS COMMISSION

Washington, DC 20554

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Federal Communications Commission
Office of Secretary

In the Matter of the)
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Petition For Clarification)
)
Department of Education,)
State of Tennessee)

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TO: THE COMMISSION

PETITION FOR CLARIFICATION

AND

EMERGENCY RELIEF

OF

DEPARTMENT OF EDUCATION, STATE OF TENNESSEE

TABLE OF CONTENTS

I. THE BACKGROUND	1
II. THE CURRENT CRISIS.....	4
III. THE CLARIFICATION REQUESTS.....	6
A. The Inclusion Of The Additional Vendors	7
B. The Elimination of the Partial Funding	9
IV. THE CONCLUSION.....	12

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The Department of Education for the State of Tennessee (hereinafter the "State" or "Tennessee" or "Applicant") herein requests that the Federal Communications Commission (hereinafter the "Commission" or the "FCC") clarify – and amend or supplement to the extent necessary for such clarification – its July 2, 2003 Order (hereinafter the "*Tennessee Order*") in the above-captioned matter (See, *In the Matter of Request for Immediate Relief filed by the State of Tennessee, Order*, FCC 03-161 (rel. July 2, 2003)). In support of this request (hereinafter the "Petition" or the "Tennessee Petition"), the State submits as follows:

I. THE BACKGROUND

1. The State is, and has been since the program's inception, an applicant for funding in the FCC's federal support mechanism for schools and libraries (hereinafter the "E-Rate Program" or

the "Program"). The E-Rate Program has been a vital and critical source of funding for the State's rural and intercity K-12 schools, and has been an integral part of the State's commitment to meet the President's "No Child Left Behind" Initiatives. The Program serves 900,000 students, 1,900 schools, and 100,000 educators. Without the Program, and without the continuation of its funding, Internet Access Services to the State's K-12 schools will be drastically reduced, impaired and interrupted. This will have an immediate and devastating impact on the State's educational programs, classrooms, students, educators and teaching abilities. The Tennessee school's urgent funding needs and the devastating impact of funding delays is a clear matter of record before the Commission in this docket, and gave rise to the *Tennessee Order* itself. Students have a very limited time in K-12 schools, and in each grade, and "down time" cannot be recaptured and made up later. Thus, timely E-Rate funding is absolutely critical.

2. The FCC's procedure to insure E-Rate Program integrity, at the time of the *Tennessee Order*, was generally to require a deferral of action on any funding commitment, or any funding distribution, to applicants by the Universal Services Administrative Company (hereinafter "USAC") where USAC "became aware of" a law enforcement investigation relating to the E-Rate activities of applicants, or of service providers utilized by applicants, until the investigation was resolved (See, *Tennessee Order*, at Section 8). In mid-2002, after the airing of media reports in Tennessee regarding possible favoritism in the awarding of state contracts during the term of a former Governor of Tennessee, an investigation was instituted surrounding a broad range of state contracts and individuals (See *Tennessee Order* at footnote 21). This broad ranging investigation included, among others, an individual who had been a founder and a shareholder in Technology Partners, Inc., later to become Education Networks of America, Inc. (hereinafter "ENA"), and

later to become the State's E-Rate Program service provider. That individual has since resigned as an employee, officer and director of ENA. Because of the broad range of companies and individuals, and the broad scope of the investigation, the investigation has continued for over two and one half (2 ½) years.

3. In order to prevent the catastrophic loss of E-Rate funding to Tennessee's 1,900 schools, 100,000 teachers and 900,000 K-12 students during the broad investigation, the Commission adopted the *Tennessee Order*. In this *Tennessee Order*, recognizing that inaction on a funding request during the pendency of an investigation would have the effect of penalizing students and parties that are in no way implicated in any potential wrongdoing, the Commission modified its good samaritan policy (hereinafter the "Policy" or the "Good Samaritan Policy") and directed USAC to process the State's funding applications under this Policy with two (2) conditions: (a) the State's election of a new Good Samaritan service provider, other than ENA – which was unavailable to receive immediate funding because of the investigation; and (b) to avoid the risk of improperly paying a potential wrongdoer, the State's new Good Samaritan service provider agreeing that "no funds will be paid to ENA pending further developments in the investigation" (See, *Tennessee Order* at Section 18). These conditions (hereinafter the "Conditions") were met by the State – and BellSouth subsequently stepped into the role of the State's Good Samaritan service provider and made the payments as directed by the *Tennessee Order* – and partial funding was forthcoming for the State's Internet Access Service service provider' vendors for E-Rate funding Year 2002.

4. In E-Rate funding Year 2003, USAC simply adopted the Conditions of the *Tennessee Order*, now permitted under its "*Principles for Treating Entities Under Investigation Relating to Their Participation in the Schools and Libraries Universal Service Support Mechanism*"

(hereinafter the “*Principles*”) (See, *Principles* at www.sl.universalservice.org/reference/investigation.asp). In this regard, USAC stated “... it is appropriate to respond to Tennessee’s Funding Year 2003 funding request associated with ENA in the same manner as the FCC directed USAC to respond to Tennessee’s Funding Year 2002 funding requests associated with ENA in the *Tennessee Order*” (See, Good Samaritan Designation Letter to BellSouth Telecommunications, Inc. dated December 21, 2004 from the Schools and Libraries Division, Universal Services Administrative Company, at Paragraph 2 – hereinafter the “*2003 Designation Letter*”). Thus, partial funding also has been forthcoming for the State’s Internet service provider vendors for E-Rate Year 2003.

II. THE CURRENT CRISIS

1. The State has applied for, and is eligible to receive under the E-Rate Program, approximately \$49.9 million in E-Rate funding for Internet Access Service over the two (2) year period from July 1, 2002 through June 30, 2004 (hereinafter the “2002 and 2003 E-Rate Funding Years”). However, the State has received only approximately \$11.6 million of this E-Rate funding. The remainder, as set forth in the below chart (hereinafter “TN Funding Chart” or “Chart”), has yet to be released by USAC.

Description	\$ in millions	% of Form 471
State Form 471 Applications: E-Rate Funding Year 2002 and Year 2003	\$71.3	100%
E-Rate Funding Approved for State @ the 70% Level	\$49.9	70%
Good Samaritan Payments So Far Approved for Vendors by USAC	\$21.3	30%
Good Samaritan Vendor Payments Actually Released to Vendors by USAC	\$11.6	16%

Accordingly, approximately \$38.3 million in approved E-Rate funding, or 54%, has not been distributed to companies that have provided services and equipment to the State in 2002 and 2003, and now this drastic reduction in available funding promises to continue into E-Rate funding year 2004, under the State's multi-year contract (hereinafter the "Tennessee Internet Access Contract" or "Contract") with ENA.

2. The State is facing no less than an educational crisis because of the past, and now promised future, reduced E-Rate distributions, and it has an urgent need for a prompt Commission action to prevent this crisis. The State is pleased with the ENA Internet Access Service (hereinafter the "Service") under its multi-year Contract. ENA has provided exemplary service. And, ENA even has provided Service at the 100% level despite the contractual ability to make Service reductions because of disbursement delays. The State further believes that ENA's E-Rate program and its Service ranks among the highest quality and the most efficient on a per-student basis in the USAC E-Rate Program¹. A loss of this quality and efficiency would be catastrophic to the efficient and effective operation of the Program in general, and to Tennessee's 900,000 children, in particular. Further, and as the Commission and USAC acknowledge, there are no charges or allegations of waste, fraud and abuse, or of any wrongdoing related to the current ENA contract or to the current ENA Service – or to any of the vendors or subcontractors that have provided services to the State. Further, the Commission has concluded that "Tennessee has complied with all competitive bidding requirements" associated with the current ENA award (See, *Tennessee Order* at Section 19, and *Designation Letter*, at Paragraph 3).

¹ By way of example, the average e-rate funding per student for the top twenty (20) e-rate applicants in 2003 was \$13.74 per student served per month. The State of Tennessee pays less than \$2.50 per student served per month (See, www.fundsforlearning.com/cgi-bin/newslist.cgi).

3. BellSouth, AT&T, Sprint and other subcontractors and vendors to ENA and the State have, in the past, accepted the delays in receiving E-Rate payments, in total reliance on the requirement in the *Tennessee Order* that their funding would be forthcoming, and expectation that USAC would implement this requirement in due course. ENA has even supported the network with its own separate increased funding for vendors for their work during this crisis and until the investigation is concluded. However, the subcontractors and vendors now have indicated that this cannot continue unless the expectations of the *Tennessee Order* are promptly realized. Thus, the State now is again faced with outages, interruptions and reductions unless there is either **immediate** FCC action on this Petition for Clarification or an **immediate sua sponte** reevaluation by USAC of its payment responsibilities, and prompt disbursement of the funds mandated by the *Tennessee Order*.

III. THE CLARIFICATION REQUESTS

1. As noted in Paragraph 3 above, one Condition of the *Tennessee Order* is that "no funds will be paid to ENA pending further developments in the ongoing investigation." To implement this Condition, the Commission charges USAC to "...determine the identities of the subcontractors, their portions of the contract, and the portion associated with services provided to ENA" (See, *Tennessee Order*, at Section 10). Then, USAC is directed "to distribute such funds" to them through the Good Samaritan service provider, BellSouth (See, *Tennessee Order*, at Section 19). In implementing this directive, however, USAC has not simply determined the subcontractor identities, verified the funding proportion due to them, and insured that no payments go to ENA, but rather has taken a much broader and yet much more restrictive approach. In particular, USAC: (a) has temporarily eliminated subcontractors from eligibility; and (b) has temporarily reduced the amounts due to those deemed eligible, contrary to the

Tennessee Order, contrary to the certifications (hereinafter the "Certifications") of their eligibility and amounts from the Applicant, the service provider and the Good Samaritan service provider, and contrary to the determinations by USAC itself that the Internet Access Service they provide is an eligible service under its rules and procedures (See, grant of the State's 471 Application). The unanticipated and unexpected elimination of vendors and the unanticipated and unexpected reductions in the amounts due to vendors apparently results from USAC's very restrictive reading of the second Condition in the *Tennessee Order*, combined with USAC's perceived inability to read it more broadly without prior Commission directions, despite any desire it may have to do so. In this regard, and as described in more detail below, it is USAC's understanding that any "interpretation" would be contrary to its mandate only to "implement" Commission directives, leaving "interpretation" of a Commission Order to the full Commission (See, Federal-State Joint Board on Universal Service, 5 CRI, 12 FCC Rcd 87, 1998). Thus, the need for this Petition for Clarification.

2. Tennessee will continue to work with USAC, and the Commission staff as USAC seeks their "further guidance" (See *Principles*, at Paragraph 11), under the belief that, USAC has the ability, under the *Principles* and the modified *Good Samaritan Policy*, to distribute the funds required under the *Tennessee Order* without prior Commission action. However, Commission intervention is now necessary due to the major vendors' stated inability to move forward on any other basis.

A. *The Inclusion of the Additional Vendors*

3. This removal from eligibility of the additional subcontractors and vendors (hereinafter the "Additional Vendors") results from the USAC position that, despite the *Tennessee Order*, it

can only authorize payments for services that are specifically set forth on its "Eligible Services List" (hereinafter the "Eligible Services List" or the "List") (See, also, www.sl.universalservice.org/reference/eligibleservices.asp). However, the List is not detailed enough to capture the Internet Service 'sub-vendors' and 'sub-sub-vendors', 'sub-sub-vendor parts', 'distributors', etc. required to be paid in the *Tennessee Order*. This List only divides eligible services into three general "baskets": (1) Telecommunications Services; (2) Internal Connections; and (3) Internet Access. The Telecommunications Services list, for example, only lists common carriage services, despite the use of other types of telecom service components in eligible Internet Access. The Internal Connections list, for example, lists only network equipment typically found inside a school rather than as part of an Internet, despite the use of other types of equipment and components in Internet Access. And, the Internet Access list itself lists only "services" (such as those full services offered by ENA) associated with the delivery of Internet service, such as email; it does not list equipment, software, or components of services that are purchased by Internet service providers and essential for Internet Service. By way of greater example, a Satellite Dish is listed as "ineligible"; however, if it is a component of an Internet Access Service and used for this purpose, it could be eligible even though it is not listed. The result of this has been that, because a component or part or sub-service may not be specifically listed in the Eligible Services List (because there are no such lists for Internet components), it is not being funded by USAC under the *Tennessee Order*. In brief, USAC is conducting a "second-and-third layer" eligibility review - not done by USAC for any other Internet Access provider under its Rules, not called for in the *Tennessee Order*, not consistent with the *Tennessee Order*, and not required under the directives or Conditions of the *Tennessee Order*.

4. The failure to consider the subcontractors and vendors for these components of the State's Internet Access service has resulted in the elimination of approximately twenty (20) major eligible vendors from E-Rate funding, pending the outcome of the broad investigation (See, *Tennessee Order* at Sections 20-21). Such action also has resulted in the reduction of approximately four million seven hundred thousand dollars (\$4.7M) in eligible disbursements to support the State's Internet Access service to the schools. These Additional Vendors are fully entitled to be funded under the *Tennessee Order*, and under the USAC Principles and Rules (See, "Broad Criteria for Eligibility" at www.universalservice.org/reference/eligserv_framework). They should not be eliminated on a temporary basis simply because no "list" of their services may be available. This is particularly true when this is directly contrary to, and inconsistent with, the *Tennessee Order*. The State respectfully requests that this be clarified by the Commission. Further, there is no reason not to deem the Additional Vendors eligible now, because they are eligible now and because when all funds are released, they all will be deemed eligible later, even under the Eligible Services List; and they will be funded in full. To permit otherwise now, is not supported by E-Rate rules and irreparably harms the E-rate Program. The State respectfully requests that the Additional Vendors be determined as eligible now for funding consistent with USAC rules (See, universalservice.org/reference).

B. The Elimination of the Partial Funding

5. In addition to the elimination of funding for the Additional Vendors – due solely to USAC's perceived concern about its authority to include them because of its inability to "match" them with its Eligible Services Listings, USAC also has been paying the subcontractors and vendors that it has found eligible, and that it does fund to some degree, less than one hundred percent (100%) of the funds actually requested by the State and its service provider, and actually

due to these subcontractors and vendors. While the Commission's *Tennessee Order* and USAC Guidelines (See, www.universalservice.org) both would seem to specifically require this (See, also, Petition, at paragraph 3, above), USAC maintains that its "past practice" has been different and that it has always paid out less than 100%. This again is due solely to USAC's inability to "match" its past practices both to the circumstances in this case and to the requirements of the *Tennessee Order*. USAC is required by the *Tennessee Order* to make full payments. USAC's "past practices" are not different or inconsistent with the State's request in this regard, and USAC's "actual practices," through any reasonable interpretation, permit and indeed require the full payment to all eligible vendors and subcontractors. Further, they do not provide USAC with the flexibility to make only partial payments to vendors. Moreover, the *Tennessee Order* does not contemplate partial payment of any charges. Tennessee, thus, respectfully requests that this be clarified in response to this Petition, and that these amounts be paid as required under the *Tennessee Order* and the USAC "past practices."

6. In support of this request, the State of Tennessee has been determined eligible for funding at the level of seventy percent (70%) (See Tennessee 471 application and Chart I, at Section II, Petition at paragraph 2). Thus, the State's Internet Access service provider (hereinafter "Service Provider") is eligible for approximately forty-nine million nine hundred thousand dollars (\$49.9M) for E-Rate Years 2002 and 2003. The State has filed, again for years 2002 and 2003 only, eligible vendor invoices representing approximately twenty-one million dollars (\$21.3M). **USAC, however, has released only approximately 40% of this amount due to USAC-acknowledged eligible vendors,** or eleven million six hundred thousand dollars (\$11.6M). Approval of the State's request, in this regard, for full funding, thus, would result in

approximately five million dollars (\$5M) becoming immediately available to USAC-determined eligible vendors

7. USAC's "past practices" have been, without exception known to the State, to fund (and to pay) **Service Providers** the full amount due to them, up to the limits of the State reimbursement. In this case, as noted above, the State funds the Service Provider at thirty percent (30%) of the eligible amounts and the E-Rate Program is required to fund the Service Provider at seventy percent (70%). The Service Provider is permitted to make distributions to its vendors, subcontractors, sub-vendors, parts suppliers, sub-service suppliers, etc. as it deems necessary to keep the Internet Service operational. USAC does not require Service Providers, such as AOL for example, to allocate payments, or even to make payments, in any fashion, or even to disclose to competitors how its service is operating and with what suppliers. However, in the current situation, USAC is carrying the Service Provider allocation down to remote levels to sub-vendors, for example. This change in USAC practices is not what the *Tennessee Order* required, is not required by the Conditions, and is not a proper reading of "past practices." "Past practices", while different because of different circumstances, may present an opportunity for a Clarification. This Clarification for Additional Funding is consistent with the *Tennessee Order*, the USAC Guidelines, and USAC's "past practices".

8. As demonstrated above, USAC's concern about its authority to make full reimbursements because of its perceived inability, without prior Commission action, to "match" the results of its past practices and its legal requirements is misplaced and unfounded.

IV. THE CONCLUSION

1. Accordingly, the State requests that the Commission clarify its *Tennessee Order* so as:
(a) to allow USAC immediately to pay those Internet subcontractors and vendors included in the State's requests that have certified to having provided Internet Service components to the State consistent with E-Rate program rules (\$4.7M); and (b) to allow USAC immediately to pay those Internet subcontractors and vendors the full amount due to them (as included in the State's requests) that have been determined eligible by USAC (\$5M), up to the 70% due to the State's Service Provider.
2. If this Petition is granted, no ineligible funds would be released. If granted, no funds would be made available to ENA. If granted, no change in USAC guidelines or procedures would be required. If granted, no funds to ineligible vendors would be released. If granted, Tennessee's 900,000 students, 1,900 schools and 100,000 teachers would be able to complete the year with no interruptions or outages or reductions in the Internet Access Services that they have enjoyed and have become reliant on to achieve educational objectives. And, if granted, eligible providers would be able to be compensated for the eligible services that they have provided.
3. If this Petition is denied, through positive action or through inaction, Tennessee schools face a potential crisis situation – and albeit totally avoidable and unnecessary.

4. Accordingly, the State hereby requests the Commission to immediately grant this Petition. As demonstrated above, the public interest will be served only by favorable and timely action on the instant Petition.

Respectfully Submitted,
State of Tennessee, Department of Education.



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Dated: January 31, 2005

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CERTIFICATE OF SERVICE

I, Christine L. Zepka, hereby certify that on this 31st day of January, 2005, a true and correct copy of the foregoing "Petition for Clarification and Emergency Relief" was sent via hand delivery to the following parties:

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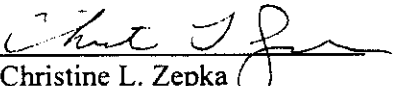
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